**Before The**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Section 272(f)(1) Sunset of the BOC Separate | ) | WC Docket No. 02-112 |
| Affiliate and Related Requirements | ) | |

# REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

The National Association of State Utility Consumer Advocates ("NASUCA") submits Reply Comments in the above-captioned proceeding. NASUCA's Comments demonstrated that, to maintain the consumer benefits associated with competition, the Commission should continue the separate subsidiary requirements for Bell Operating Companies ("BOCs") that provide interLATA service within their local service regions. The majority of commenters, representing a variety of concerns, voiced similar views.[1]

In these Reply Comments, NASUCA responds to the BOC commenters who advocate eliminating the separate subsidiary requirements.[2] Their arguments are that Congress established a presumption that the requirements would sunset three years after

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[1] Commenters with positions similar to NASUCA's are the State of New Jersey Department of Ratepayer Advocate; the New York Department of Public Service; the Pennsylvania Public Utility Commission ("PA PUC"); the Public Utility Commission of Texas ("PUCT"); the Washington Utilities and Transportation Commission ("WUTC"); the Wyoming Public Utilities Commission; the Office of Attorney General of the State of Texas; Sprint Corporation; WorldCom, Inc.; Time Warner Telecom Corporation; Focal Communications Corporation, Pac-West Telecomm, Inc. and US LEC Corp.; the Association for Local Telecommunications Services; and the Competitive Telecommunications Association.

[2] BellSouth Corporation ("BellSouth"), Qwest Services Corp. ("Qwest"), SBC Communications, Inc. ("SBC"), Verizon and the United States Telecom Association ("USTA"). The fact that NASUCA does not address all arguments advanced by any party is not necessarily an indication that NASUCA acquiesces to the arguments not addressed in these Reply Comments.

receiving § 271 approval, that the requirements should sunset three years after the BOC first receives § 271 approval, and that alternatives to the separate subsidiary requirements are adequate to protect competition. As shown below, these arguments are without merit. The Commission should extend the separate subsidiary requirements.

## I. THERE IS NO PRESUMPTION THAT THE SEPARATE SUBSIDIARY REQUIREMENTS SHOULD SUNSET.

The BOCs argue that the plain language of § 272 creates a presumption for the Commission to sunset the separate subsidiary requirements. They assert that because the requirements could be extended only by rule, Congress expected BOCs to be relieved of the § 272 requirements.[3] In addition, BellSouth and Verizon claim that the statute requires the Commission to sunset the requirements in the absence of a compelling need to retain them.[4]

The BOCs read too much into the language of § 272. No presumption – either to retain or eliminate the separate subsidiary requirements – is created by the Telecommunications Act of 1996 ("the Act").[5] Rather, the section merely presumes that the Commission would examine the need for extending the requirements before the Act requires them to sunset.

Moreover, the plain language of the statute does not require a showing of compelling need to retain the requirements. The Commission must only determine that retention of the requirements is in the public interest.[6]

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[3] See BellSouth Comments at 4; Verizon Comments at 3; SBC Comments at 19.

[4] BellSouth Comments at 3; Verizon Comments at 3.

[5] Pub. L. No. 104-104, 110 Stat. 56.

[6] See 47 U.S.C. § 272(f)(3).

Nevertheless, the BOCs' continued monopoly in local exchange service – especially for residential customers – provides a compelling reason for retaining the separate subsidiary requirements. As NASUCA's initial comments noted, incumbents still control the vast majority of access lines.[7]

BellSouth and Qwest argue that the Commission need not consider local competition in deciding whether to continue protecting competition in the long distance market.[8] In fact, the absence of effective local competition will serve to enhance the BOCs' ability and incentive to affect competition in the long distance market. The separate subsidiary requirements were designed to prevent BOCs from using their local exchange bottlenecks to influence long distance competition.[9]

Two other points advanced by Qwest are also erroneous. First, Qwest asserts that the proponent of extension of the separate subsidiary requirements bears the burden of proof concerning its necessity.[10] Qwest notes that the requirements can only be extended by rule or order, and asserts that § 556(d) of the Administrative Procedure Act[11] places the burden of proof on the proponent of a rule or order.[12]

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[7] NASUCA Comments at 4-5.

[8] BellSouth Comments at 14; Qwest Comments at 4-5.

[9] See *Notice of Proposed Rule Making*, WC Docket No. 02-112, FCC 02-148, adopted May 16, 2002 ("*Notice*"), ¶ 3. In this regard, NASUCA echoes the call of the New Jersey Ratepayer Advocate that the Commission conduct a proceeding to examine the criteria to be used in determining whether a BOC should be free of the separate subsidiary requirements. See New Jersey Ratepayer Advocate Comments at 6.

[10] Qwest Comments at 3.

[11] 5 U.S.C. § 556(d).

[12] Qwest Comments at 3.

Qwest, however, misapplies § 556(d). That provision does not apply to general rulemaking, only to agency hearings. In the rulemaking context, the section applies only to agency hearings that are required by statute.[13]

Second, Qwest argues that the advocate of a different sunset date must demonstrate circumstances that were unanticipated when statute was adopted.[14] For support, Qwest cites to the Commission's holding in an Ameritech alarm monitoring case.[15]

That case is not controlling, since Ameritech was seeking to *shorten* a sunset date that was provided by statute.[16] In the instant proceeding, Congress anticipated that the Commission might extend the separate subsidiary requirements by rule. Qwest's assertion is erroneous.

## II. THE COMMISSION SHOULD MAKE A STATE-BY-STATE DETERMINATION REGARDING WHETHER THE REQUIREMENTS SHOULD SUNSET.

The BOCs also assert that Congress intended the separate subsidiary requirements to sunset on a BOC-by-BOC basis, rather than state-by-state.[17] They point to a change in the language of the the Act made in conference committee, which adopted the sunset provision contained in the House version but deleted the phrases "in any state" and "in

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[13] See 5 U.S.C. § 553(c).

[14] Qwest Comments at 3.

[15] *Id.*, n.7 [citing *In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended*, Memorandum Opinion and Order, 15 FCC Rcd 7066, 7070 ¶ 8 (1999)].

[16] *Id.*

[17] See BellSouth Comments at 5; Verizon Comments at 3-5; SBC Comments at 19-21; USTA Comments at 4-6.

such state."[18] From this editorial action by Congress, the BOCs have leapt to the conclusion that Congress intended the requirements to sunset for all of a BOC's long distance affiliates three years from the date of the BOC's first § 271 authorization.[19]

The BOCs' interpretation of the statute is strained. Section 272 requires sunset of the requirements three years after a BOC or its affiliate "is authorized to provide interLATA telecommunications services under section 271(d)." However, § 271(d) is state-specific; it requires the BOC's application to "identify each state for which authorization is sought."[20] Since approval can be granted only on a state-by-state basis, then the separate subsidiary requirements can sunset only on a state-by-state basis.[21]

Moreover, the BOCs' position would set up a scenario where a BOC could get § 271 authorization in one state and have the separate subsidiary requirement sunset in *all* states *before* § 271 approval is obtained in those other states. This obviously is not the intent of Congress as presented in the plain language of the statute.

While NASUCA favors lifting the separate subsidiary requirements on a state-by-state basis,[22] there is merit in the proposal advanced by WUTC. WUTC favors retention of the separate subsidiary requirements and proposes sunsetting the rule no sooner than three years after approval is given to a BOC's *last* pending § 271 application.[23] Such a procedure would help ensure that consumers continue to have real choice for long

[18] See Verizon Comments at 5.

[19] See *id.*

[20] 47 U.S.C. § 271(d)(1).

[21] See PA PUC Comments at 3.

[22] See NASUCA Comments at 6-8.

[23] WUTC Comments at 3.

distance service and would alleviate SBC's concerns in implementing a sunset provision on a state-by-state basis.[24]

## III. ALTERNATIVES TO THE SEPARATE SUBSIDIARY REQUIREMENTS ARE INADEQUATE TO PREVENT BOCS FROM AFFECTING COMPETITION AND TO PROTECT THE PUBLIC INTEREST.

The BOCs claim that alternatives to the separate subsidiary requirements would be adequate to protect competition. BellSouth points to nonstructural safeguards as an alternative.[25] Other BOCs assert that the nondiscrimination requirements of § 272(e) and interconnection obligations under § 251 ensure that long distance providers will be able to compete fairly.[26] SBC claims that local exchange and exchange access competition will police the BOCs' behavior through competitive local exchange carriers' ("CLECs'") aggressive marketing strategies and competitive triggers for special access pricing flexibility.[27]

The Commission has noted the reasons for requiring BOCs to provide in-region interLATA service through a separate subsidiary:

> The Commission stated that as long as the BOCs retain market power in the provision of these services, they will have an incentive and ability to discriminate against their long distance competitors, and engage in other anti-competitive conduct. In particular, the Commission found the BOCs to be dominant carriers with an incentive to discriminate in providing exchange access services and facilities that their interexchange competitors need to compete in the interLATA telecommunications services markets.[28]

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[24] See SBC Comments at 21-23.

[25] BellSouth Comments at 18-20.

[26] See Qwest Comments at 7-12; Verizon Comments at 14-15; SBC Comments at 12-14; USTA Comments at 8.

[27] SBC Comments at 15-18.

[28] *Notice*, ¶ 3 (discussing *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21911-13, ¶ 10-12 (1996)).

This concern has been supported in comments filed by the PUCT. The PUCT states that in Texas SBC has failed to achieve full compliance with performance measures for local access and refuses to allow CLEC customers to presubscribe to SBC's intraLATA toll.[29] This has occurred despite the existence of the nondiscrimination provisions of the Act and SBC's claim that CLECs have 21% of the local exchange market share in Texas.[30]

Verizon also argues that local exchange competition has "flourished" during the past three years, alleviating the need for the separate subsidiary requirements.[31] For support, Verizon points to an increased line count for CLECs and the migration of customers from wireline to wireless service.[32]

Verizon paints only half the picture. CLECs are slowly chipping away at the BOCs' monopolies, with residential competition only beginning to emerge in some areas. As NASUCA's initial comments noted, the BOCs continue to dominate the local exchange market.[33] Thus, the BOCs retain the ability and incentive to affect competition.

In addition, wireless is not always an alternative to service from a BOC. Two of the largest wireless providers – Cingular (a joint venture of SBC and BellSouth) and Verizon – are owned by BOCs. The switching of a BOC's customers from its wireline service to its wireless affiliate is comparable to customers choosing between a BOC and

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[29] Texas PUC Comments at 5-7.

[30] SBC Comments at 16. For support, SBC cites to the Commission's local competition report release of May 2001. That report (at Table 6) shows that CLECs had a 12% market share as of December 31, 2000. The most recent local competition report, released July 2002, shows (at Table 6) the CLEC share in Texas to be 16% as of December 31, 2001.

[31] Verizon Comments at 6.

[32] *Id.* at 6-7.

[33] See NASUCA Comments at 3-4.

the BOC's CLEC affiliate. The BOC's loss of market power is minimized. Verizon's arguments are not persuasive.

Moreover, at least one public utility commission has expressed the need for continuation of the separate affiliate requirements as a means to ensure the adequacy of state-conducted audits.[34] In addition, Qwest's recent disclosure that it had improperly accounted for $1.1 billion dollars in revenue calls into question the adequacy of accounting safeguards alone in protecting the public interest.[35] At a time when public confidence in accounting standards for the telecommunications industry is ebbing, it would be administratively efficient and prudent to keep the separate affiliate requirements in place as the Commission wrestles with how to best ensure that financial information being reported in the recent past – including past compliance with § 272 by those now urging its elimination – has been accurate.

The public interest requires assurance that BOCs cannot use their market power to engage in anticompetitive activities. The Commission should retain the separate subsidiary requirements.

## IV. CONCLUSION

Eliminating the separate subsidiary requirements is premature. The Commission should retain them and require BOCs to demonstrate, on a state-by-state basis, that the BOC no longer has the ability and incentive to affect long distance competition.

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[34] See PA PUC Comments at 4-6.

[35] See "Qwest Cuts Forecasts for 2002, Seeks Easier Terms from Banks," Wall Street Journal, August 9, 2002, at B5.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of the National Association of State Utility Consumer Advocates was served by first-class mail, postage prepaid, to the parties of record identified below, on this 26th day of August 2002.

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